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IN THE

Supreme Court of the United States

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No. [redacted] October Term, 1939

[illegible] T. Helvering, Commissioner of Internal Revenue,
Petitioner,

v.

Paul R. B. Hoser.

On Petition For a Writ of Certiorari to the United States Circuit Court of Appeals For the Second Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

Harry H. Wiseman,
Attorney for Respondent.

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against

PAUL R. G. HORST.

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BRIEF FOR THE RESPONDENT IN OPPOSITION.

Opinions Below.

Two opinions were delivered in the Board of Tax Appeals. Three members of the Board joined in a written dissent from the majority opinion. The majority opinion (R. 24) and the minority opinion (R. 31) are reported in 39 B. T. A. 757.

The opinion of the Circuit Court of Appeals (R. 46) is reported in 107 F. (2d) 906.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on December 2, 1939 (R. 49). The petition for certiorari was filed March 2, 1940. The jurisdiction of this Court is invoked by the Commissioner under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

The sole question presented is whether the taxpayer who detached coupons from bonds owned by him and delivered the coupons to another as a gift prior to their maturity is liable for income tax on the amounts thereafter collected on the coupons by the donee.

Statute Involved.

Revenue Act of 1934, c. 277, 48 Stat. 680:

> "SEC. 22. GROSS INCOME.
>
> (a) *General definition.*—'Gross Income' includes gains, profits, and income derived * * * from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *" (U. S. S., Title 26, Sec. 22.)

Statement of Case.

The facts were stipulated and the Board of Tax Appeals adopted the stipulation (R. 39-43) as its findings of fact, which are substantially as follows (R. 25-26):

The taxpayer is a citizen of the United States. He kept his books and made his income tax returns on the cash basis (R. 25).

Throughout 1934 and 1935 the taxpayer was the owner of a number of coupon bonds (R. 25).

On August 10, 1934, the taxpayer detached unmatured coupons in the total amount of $25,182.50 and delivered them to his son as a gift. In August, 1935, the taxpayer made a similar gift to his son, involving unmatured coupons in the total amount of $37,032.50 (R. 25).

When the coupons matured, the son cashed them and included the proceeds in his income tax returns (R. 25-26).

The Commissioner, claiming that the proceeds were income to the taxpayer, added them to the taxable income of the taxpayer and determined a deficiency against the taxpayer for each year (R. 26).

The Board of Tax Appeals, three members dissenting, approved the Commissioner's determinations (R. 24-31).

The taxpayer appealed to the Circuit Court of Appeals for the Second Circuit, which reversed the Board's decision, holding that the amounts collected on the coupons were not income of the taxpayer (R. 46-48).

Argument.

I.

The Court below has held that the taxpayer is not liable for income tax on the amounts collected by his son on the coupons which the taxpayer, prior to their maturity, detached and delivered to his son as a gift. This decision

is in accord with applicable decisions of this Court and of the Circuit Courts of Appeals.

Negotiable interest coupons, when severed from the bonds to which they were originally attached and transferred to a person other than the owner and holder of the bonds, cease to be incidents of the bonds and become in fact separate and independent instruments, distinct from the bonds, and pass by delivery. They may be sold or made the subject of a gift *inter vivos.*

Clark v. *Iowa City,* 20 Wall 583;
Koshkonong v. *Burton,* 104 U. S. 668;
Clokey v. *Evansville & T. H. R. R. Co.,* 16 App. Div. 304;
Spooner v. *Holmes,* 102 Mass. 503;
Pratt v. *Higginson,* 230 Mass. 256;
Daniel on Negotiable Instruments, (7th ed. (1933) Vol. 3, p. 1919, Sec. 1873).

This Court, in *Clark* v. *Iowa City* (20 Wall. 583), *supra,* stated the rule as follows (p. 589):

> "These coupons, when severed from the bonds, are negotiable and pass by delivery. They then cease to be incidents of the bonds, and become in fact independent claims; they do not lose their validity, if for any cause the bonds are cancelled or paid before maturity; nor their negotiable character; nor their ability to support separate actions, and the amount for which they are issued draws interest from its maturity. They then, possess the essential attributes of commercial paper, as has been held by this court in repeated instances.
>
> • • • • • • • • • •
>
> "Coupons, when severed from the bonds to which they were originally attached, are in legal effect equiv-

alent to separate bonds for the different installments of interest. The like action may be brought upon each of them, when they respectively become due, as upon the bond itself when the principal matures; * * *."

When the taxpayer detached the unmatured coupons and delivered them to his son as a gift, "the donee acquired title to a severable part of each of the original instruments; the part which carried the right to receive the payment in question, free from the interference or assistance of the donor, and without regard to what disposition was made of the remainder of the instrument".

Williston v. *Commissioner,* 2 Mass. A. T. B. 663; Cases, supra.

The amounts collected on the coupons by the donee were the donee's income, not the income of the donor, as it was subject to the unfettered command of the donee, not subject to any power of control over it exercisable by the donor; the source of it being severable parts of the original instruments carrying the right to receive the interest thereon for stated periods and irrevocably vested in the donee.

Cf. United States v. *First National Bank of Birmingham* (C. C. A. 5) 74 F. (2d) 360.

The income in question was not taxable to the taxpayer because he did not control it, or receive it, or own it, or have any beneficial interest therein. "The one who is to receive the income as the owner of the beneficial interest is to pay the tax".

Blair v. *Commissioner,* 300 U. S. 5.

The Court below followed the decision of the Circuit Court of Appeals for the Seventh Circuit in *Rosenwald* v. *Commissioner,* 33 F. (2d) 423,[1] where the precise question here presented was decided against the Commissioner. There the taxpayer clipped negotiable interest coupons from Third Liberty Loan bonds and delivered the coupons to a donee prior to maturity. The donee collected the interest due on the coupons at maturity. It was held that the interest collected on the coupons by the donee was not taxable as income to the taxpayer.

This Court decided that the question here presented is one which it will not review when it denied the Commissioner's petition for a writ of certiorari in *Matchette* v. *Helvering,* (C. C. A. 2), 81 F. (2d) 73, certiorari denied, 298 U. S. 677, where it was held that a stockholder who made an outright assignment of a dividend after the date of declaration but before the date of payment was not taxable on the dividend.

The Massachusetts Appellate Tax Board, in *Williston* v. *Commissioner* (2 Mass. A. T. B. 663), *supra*[2], where the facts were identical with those in this case, citing the Board's decision in this case, but refusing to be persuaded by it, reached the same conclusion as the Court below a few months before the decision below was handed down.

The alleged conflict of decision (Pet. 5) does not exist. In *Helvering* v. *Clifford,* No. 383, this term, decided Febru-

[1] The taxpayer's petition for a writ of certiorari in this case was denied (280 U. S. 599). The Commissioner, then, did not think enough of the point that he is now urging to seek a review in this Court of the decision against him.

[2] This case is now pending on appeal in the Supreme Judicial Court of Massachusetts.

ary 26, 1940, this Court held that on the facts of the case the taxpayer, who was the grantor of an irrevocable, short term trust, remained, for the purposes of section 22(a) of the Revenue Act of 1934, the owner of the trust corpus. "In view of this result," the Court said, "we need not examine the contention that the trust device falls within the rule of *Lucas* v. *Earl*, 281 U. S. 111 and *Burnet* v. *Leininger*, 285 U. S. 136, relating to the assignment of future income; • • •". The *Clifford* decision, therefore, does not touch the question here presented.

Nor has the Court below ignored the doctrine of *Lucas* v. *Earl* (281 U. S. 11), *supra*, and *Burnet* v. *Leininger* (285 U. S. 136), *supra*. The Commissioner invoked the doctrine of those cases in this Court in *Blair* v. *Commissioner* (300 U. S. 5), *supra*, only to learn that that doctrine was limited in its application to the assignment of future personal earnings and did not apply to the assignment by a father to his children of beneficial interests in the income of a testamentary trust. As this Court there pointed out (pp. 11-12):

> "These cases (Lucas v. Earl and Burnet v. Leininger) are not in point. The tax here is not upon earnings which are taxed to the one who earns them."
> • • • • • • • • • •
> "In the instant case, the tax is upon income as to which, in the general application of the revenue acts, the tax liability attaches to ownership."

The Commissioner cites a list of cases in which, he says, "the Circuit Courts of Appeals have consistently held that unless the taxpayer assigns the corpus which produces the income, he cannot by assignment of future income be relieved of taxation on that income" (Pet. 6-7). Among the cases cited is *Rosenwald* v. *Commissioner* (33 F. [2d] 423,

certiorari denied, 280 U. S. 599), *supra*, which does in fact support the Commissioner's contention. It is that very case, however, which draws the distinction that takes this case out of the rule which the Commissioner seeks to apply here.

The Commissioner says that the taxpayer "clearly would be taxable on the amount of the bond coupons if he had collected the interest payments before giving the proceeds to his son; or, indeed, if he had directed the son to collect the coupons as his agent and to keep the proceeds as a gift" (Pet. 7).

This would undoubtedly be true, but the taxpayer did not do either of these things any more than did the taxpayer in *Blair* v. *Commissioner* (300 U. S. 5), *supra*, when he assigned to his children beneficial interests in the income of a testamentary trust.

Conclusion.

The decision below is correct. There is no conflict of decision, but, on the contrary, there is unanimity of decision; and besides, this Court has already decided that the question here presented is one which it will not review. It follows, therefore, that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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March, 1940.

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